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No. 1

In The

Supreme Court of the United States

LARRY NORRIS, Director,
Arkansas Department of Correction,

Petitioner,

v.

SEDRICE MAURICE SIMPSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Respondent was convicted and sentenced to death in 1998; his conviction became final a year later. At that time, an Arkansas statute made mentally-retarded persons ineligible for the death penalty. Respondent did not once claim during his state-court proceedings that he was mentally retarded. In 2002, this Court overturned its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment proscribes the execution of the mentally retarded. Respondent later filed a federal habeas corpus petition asserting, for the first time, that he is mentally retarded and therefore ineligible for the death penalty. He claimed that his failure to raise the claim in state court should be excused because the claim was not available until *Atkins* was decided. The question presented is:

Whether the legal basis for respondent's Eighth Amendment mental-retardation claim was unavailable at the time of his state court proceedings, and therefore excuses his procedural default, even though precisely the same claim was available under state law at the time of his trial, conviction, and appeal.

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PETITION FOR WRIT OF CERTIORARI

Larry Norris, Director of the Arkansas Department of Correction, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 490 F.3d 1029. Appendix at 1-13. The unreported decision of the United States District Court for the Eastern District of Arkansas is reproduced in the appendix at 14-64. The District Court's order denying the respondent's motion to amend the judgment is reproduced in the appendix at 65-72.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2007. Appendix at 1. The order denying the petition for rehearing and suggestion for rehearing *en banc* was entered on August 20, 2007. Appendix at 76. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 28 U.S.C. § 2254, which grants federal courts the power to entertain federal habeas corpus petitions filed by persons in state custody, is reproduced in the appendix at 77-80.

Arkansas Code Annotated § 5-4-618 (Repl. 2006), which declares mentally-retarded persons categorically ineligible for the death penalty and sets forth the procedures for raising claims of ineligibility, is reproduced in the appendix at 81-82.

STATEMENT OF THE CASE

In 1998, an Arkansas jury convicted respondent of two counts of capital murder and sentenced him to death. The Supreme Court of Arkansas affirmed his conviction and sentence, *see Simpson v. State*, 339 Ark. 467, 6 S.W.3d 104 (1999), as well as the denial of his application for state post-conviction relief, *see Simpson v. State*, 355 Ark. 294, 138 S.W.3d 671 (2003). Despite the availability of Act 420 of 1993, an Arkansas statute that made mentally-retarded persons categorically ineligible for the death penalty, *see* Ark. Code Ann.

§ 5-4-618(b) (Repl. 2006), and provided a procedure for raising claims of ineligibility, *see* § 5-4-618(d) (Repl. 2006), respondent never claimed, in state court, that he was mentally retarded.

On December 2, 2004, respondent filed a petition seeking federal habeas relief pursuant to 28 U.S.C. § 2254, wherein he raised, *inter alia*, an Eighth Amendment claim alleging that he was ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002), which overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989), and held, for the first time, that it was unconstitutional to execute the mentally retarded. Acknowledging his failure to raise the Eighth Amendment claim in state court, respondent asserted that there was cause to excuse the default because *Atkins,* which was decided after his conviction became final, was a sudden departure from *Penry,* such that his Eighth Amendment claim was unavailable when he challenged the judgment in state court. *Simpson v. Norris*, No. 5:04-CV-429, Docket Entry No. 1, Petition for Writ of Habeas Corpus, at 18. The United States District Court for the Eastern District of Arkansas, finding that respondent could have raised a mental-retardation claim under state law prior to *Atkins*, and could not demonstrate that a reasonable fact-finder would have found him ineligible for the death penalty, declined to excuse the procedural default and denied relief. Appendix at 36-42.

On June 27, 2007, the United States Court of Appeals for the Eighth Circuit reversed the judgment of the District Court, disagreeing that the availability

of a mental-retardation claim under state law had any bearing on whether respondent procedurally defaulted his Eighth Amendment claim. According to the Eighth Circuit, the availability of a similar claim under preexisting state law was "irrelevant" to its analysis because respondent was "raising a previously unavailable federal claim, and that claim is separate and distinct." Appendix at 11. The court also concluded that the Eighth Amendment claim did not come within the ambit of 28 U.S.C. § 2254(e)(2), which generally bars hearings for habeas petitioners who fail to diligently develop the factual bases for their claims in state court. Despite the availability of a procedure for developing mental-retardation claims under state law, the Eighth Circuit reasoned that § 2254(e)(2) did not apply to respondent because "*Atkins* created a previously unavailable claim based on the unconstitutionality of executing the mentally retarded," and, therefore, respondent "can hardly be said to have lacked diligence in developing the factual basis of that claim in state court." Appendix at 11. Indeed, the Eighth Circuit actually determined that respondent was entitled to an evidentiary hearing because his "inability to present his *Atkins* claim in state court precluded him from receiving 'a full and fair evidentiary hearing' there," satisfying one of the conditions in *Townsend v. Sain*, 372 U.S. 293, 312 (1963). Appendix at 12. Consequently, the Eighth Circuit reversed and remanded the case to the District Court for an evidentiary hearing on respondent's *Atkins* claim.

Petitioner unsuccessfully sought rehearing by the panel and rehearing *en banc* in the Eighth Circuit. Writing for the three judges dissenting from the denial of rehearing *en banc*, Judge Steven Colloton observed that there was "a serious question" of whether respondent could demonstrate cause to excuse the procedural default, because if he "had pursued successfully a defense of mental retardation under Arkansas law, then the State would have excluded him categorically from eligibility for the death penalty, and thus complied with the equivalent rule of federal law announced later in *Atkins*." Appendix at 75. Judge Colloton also noted that respondent's case, "where the applicant failed to pursue an available claim under a state statute that anticipated and embodied the subsequently announced federal rule," was indistinguishable from *Dugger v. Adams*, 489 U.S. 401, 407-10 (1989). Appendix at 75-76. In closing, Judge Colloton observed that "[t]his case raises the important question whether Arkansas may enforce its procedural requirement that a claim of mental retardation must be raised in a timely way through the means specified by state law." Appendix at 76.

Petitioner subsequently filed a motion seeking a stay of the Eighth Circuit's mandate pending the filing of a petition for writ of certiorari in this Court. The Eighth Circuit denied the motion and issued its mandate on August 31, 2007. On October 1, 2007, petitioner applied to Justice Alito for a stay of the

Eighth Circuit's mandate, which he granted on October 16, 2007.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision Directly Conflicts With This Court's Decision in *Dugger v. Adams*, 489 U.S. 401 (1989).

The Eighth Circuit's holding in this case – that the availability of a similar claim under state law is irrelevant to the determination of whether there is cause to excuse the default of a subsequently available federal claim – directly conflicts with this Court's holding in *Dugger v. Adams*, 489 U.S. 401 (1989). In *Adams*, this Court considered the availability of a similar claim under state law to be a "critical fact," and held that when an element of the state-law claim is also a "necessary element" of the federal claim, the novelty of "the subsequently available federal claim does not excuse the procedural default." *Adams*, 489 U.S. at 407-08, 410. The Eighth Circuit decided that the availability of the state claim had no bearing on the issue of default solely because state-law claims are generally "separate and distinct" from claims under federal law. Appendix at 11. It failed to analyze whether any part of a mental-retardation claim under Arkansas law was a necessary element of respondent's *Atkins* claim. Its analysis, which altogether ignored *Adams*, led to the erroneous excusal of respondent's procedural default despite the availability of a mental-retardation claim under Arkansas law.

Appendix at 11. This Court should grant certiorari and reverse this blatant disregard of *Adams*'s principles.

1. In *Adams*, this Court reversed the Eleventh Circuit's judgment excusing the procedural default of Adams's claim that the state trial judge's instructions, which misinformed the jury about its sentencing responsibility under state law, invalidated his death sentence under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *See Adams*, 489 U.S. at 406, 411. The Eleventh Circuit held that *Caldwell*, which was decided after Adams's conviction became final, was so novel that a legal basis for the claim was not reasonably available during Adams' trial or direct appeal, the time at which the state court held he should have raised it. *See Adams*, 489 U.S. at 406.

This Court held that *Caldwell* did not provide cause to excuse the default, noting that pre-existing state law already invalidated sentences on precisely the same ground as a "necessary element" of the *Caldwell* claim – misinformation that diminished the jury's responsibility to impose a death sentence. *Adams*, 489 U.S. at 407-08, 410. The Court concluded, therefore, that a legal basis to challenge the instructions – the same as later alleged in the *Caldwell* claim – was "plainly available" during state-court proceedings, and it was not safe to assume that the novelty of the *Caldwell* claim was the reason for the default. *Adams*, 489 U.S. at 409. Additionally, the Court observed that because a successful claim under state law could have corrected the error in the state

system, the State had "every interest" in a timely challenge to the instruction, and "that interest does not disappear when it is later held that the instruction violates the Federal Constitution if it erroneously describes the role of the jury under state law." *Adams*, 489 U.S. at 409.

Despite *Adams*, the Eighth Circuit considered the availability of a claim of ineligibility for the death penalty under Ark. Code Ann. § 5-4-618 irrelevant to its determination of whether to excuse the procedural default of respondent's *Atkins* claim. To be sure, the Eighth Circuit is correct in its apparent belief that state and federal law claims generally are "separate and distinct" because, unlike federal claims, state-law claims are generally not the concern of federal courts during habeas proceedings. *See, e.g.*, *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). *Adams* dictates, however, that federal courts must go beyond that technical state-federal distinction before excusing the default of a federal claim that has a preexisting state-law analogue, as the issue is whether the court should exercise its "equitable power to overlook the respondent's state procedural default," and, not simply whether he had an analogous federal claim, and, therefore, "could have obtained federal habeas relief at the time of his trial." *Adams*, 489 U.S. at 410. The decision requires an exercise of discretion that is lacking in the Eighth Circuit's opinion; one that weighs "Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners," against "the State's interest

in the integrity of its rules and proceedings and the finality of its judgments." *Reed v. Ross*, 468 U.S. 1, 10 (1984). *Adams* establishes that the State's interests are greater when an element of the preexisting state-law claim is a "necessary element" of the defaulted federal claim.

2. Arkansas' preexisting prohibition against executing mentally-retarded persons gives it a significant interest in finality where procedurally defaulted *Atkins* claims are concerned. By enacting Ark. Code Ann. § 5-4-618 in response to *Penry v. Lynaugh*, 492 U.S. 302 (1989), and becoming part of the national consensus that helped settle the Eighth Amendment's categorical prohibition against executing the mentally retarded, *see Atkins*, 536 U.S. at 314-17, 321, Arkansas "*already complied* with the Eighth Amendment rule announced in *Atkins* . . . even before *Atkins* was decided." Appendix at 74. Indeed, *Atkins* relies on the state statute's criteria to define ineligibility for the death penalty under the Eighth Amendment. *See Atkins*, 536 U.S. at 317. Accordingly, the Supreme Court of Arkansas treats the state and federal claims as one-in-the-same; *see Anderson v. State*, 357 Ark. 180, 215, 163 S.W.3d 333, 354-55 (2004), and, as it no doubt would have done in respondent's case, refuses to disturb the finality of state judgments by recalling its mandate to allow litigation of the *Atkins* claims of defendants who never claimed they were mentally retarded under state law. *See Coulter v. State*, 365 Ark. 262, 269, 227 S.W.3d 904, 909 (2006), *cert. denied sub nom.* 127

S. Ct. 138 (2006); *Engram v. State*, 360 Ark. 140, 151-52, 200 S.W.3d 367, 373-74 (2004). Despite Arkansas' significant interest in finality, as well as in the integrity of procedural rules that further it, the Eighth Circuit did not afford these interests any weight before excusing the procedural default of respondent's *Atkins* claim.

3. Indeed, in direct conflict with *Adams*, the Eighth Circuit dismissed the availability of a mental-retardation claim under Arkansas law as *irrelevant* and erroneously found cause to excuse the default of respondent's mental-retardation claim because it was unavailable, as a federal claim, until this Court decided *Atkins* in 2002. Respondent's *Atkins* claim is identical to the mental-retardation claim that was available under state law when he was tried in 1998. The necessary element of his claim of ineligibility for the death penalty under *Atkins* – that he meets the state's criteria for mental retardation – obviously is an element of the same claim under Ark. Code Ann. § 5-4-618. *See Atkins*, 536 U.S. at 317. Certainly, if respondent successfully alleged that he met the criteria for mental retardation at the time of his trial, a state court would have declared him ineligible for the death penalty, and he would have no basis for his *Atkins* claim. A legal basis for respondent's *Atkins* claim – that he is ineligible for the death penalty because he meets the state's criteria for mental retardation – was plainly available to him, despite the state-federal distinction.

Consequently, Arkansas' preexisting prohibition against executing mentally-retarded persons gave it "every interest" in a timely claim, and its interest did not disappear simply because *Atkins* made the prohibition a constitutional matter. The Eighth Circuit nevertheless held that respondent's mental-retardation claim was unavailable until *Atkins* because, contrary to *Adams*, its analysis did not go beyond the technical distinction between state and federal claims. The result is an unwarranted infringement on Arkansas' interest in finality, as respondent is now allowed to litigate a claim that he surely would have asserted in state court if he really was mentally retarded. This Court should grant the petition and grant plenary review or summarily reverse the Eighth Circuit's judgment.

CONCLUSION

For the reasons and authorities set forth above, the petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully Submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-2823

Sedrice Maurice Simpson, Appellant, v. Larry Norris, Director, Arkansas Department of Correction, Appellee.	*	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: March 14, 2007
Filed: June 27, 2007

Before RILEY, BOWMAN, and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

Sedrice Simpson, a prisoner under sentence of death in the State of Arkansas, appeals the district court's denial of his petition for a writ of habeas corpus, *see* 28 U.S.C. § 2254. We vacate the judgment and remand for further proceedings.

I.

Almost ten years ago, the H & H Grocery in Holly Springs, Arkansas, was robbed and the two store clerks working there, Wendy Pennington and Lena Garner, were shot and killed with a blast from a 12-gauge shotgun. Shortly after the shooting, Mr. Simpson went to see Bernard Gregory and left a 12-gauge shotgun with him; Mr. Gregory saw blood on Mr. Simpson's right hand at that time. Mr. Simpson then went to the home of Frederick Wright and told Mr. Wright that he had just "shot two bitches"; Mr. Simpson also gave Mr. Wright some blood-covered money. After Mr. Simpson left the car that he had been driving at his mother's house, his mother reported to the police that two guns were missing from the car's trunk. Mr. Simpson was arrested, advised of his *Miranda* rights, and taken to jail. He then signed a waiver-of-rights form and gave a statement implicating his co-defendant, Ezekiel Harrison, in the killings.

Mr. Harrison pleaded guilty to second-degree murder and was sentenced to two consecutive twenty-year terms of imprisonment. At Mr. Simpson's trial, Mr. Harrison and Mr. Simpson both testified that the other one had killed the two victims. Mr. Harrison testified that he was outside pumping gas when Mr. Simpson, without telling Mr. Harrison, took the shotgun, went into the store, fired the shots, and came out of the store carrying the cash register drawer in his bloody hands. Mr. Simpson testified that he was outside putting air in a tire when Mr.

Harrison, without telling Mr. Simpson, took the shotgun, went into the store, and fired the shots, after which he came out of the store with the cash register drawer. The jury evidently credited Mr. Harrison's story because it convicted Mr. Simpson of two counts of capital murder.

At the penalty phase of the trial, the jury found three aggravating factors: that the murders were committed for the purpose of avoiding or preventing an arrest; that the murders were committed for pecuniary gain; and that Mr. Simpson caused the death of more than a single person in the same criminal episode. The jury found no mitigating factors. Mr. Simpson was sentenced to death by lethal injection, and the Arkansas Supreme Court upheld his conviction on direct appeal, *Simpson v. State,* 339 Ark. 467, 6 S.W.3d 104 (1999).

After exhausting his state post-conviction remedies, Mr. Simpson filed a petition for relief under § 2254(a), advancing eight claims. The district court denied the petition, *see Simpson v. Norris,* No. 04CV00429, 2006 WL 1520628 (E.D. Ark. May 30, 2006), but granted Mr. Simpson a certificate of appealability with respect to all eight claims; the defendant pursues six of these in this appeal. Mr. Simpson claims that his eighth amendment rights were violated when the state court refused to instruct the jury that Mr. Harrison's lesser sentence was a mitigating circumstance that could be considered in fixing Mr. Simpson's sentence. He also claims that he was denied his constitutional right to the effective assistance of

state post-conviction counsel, and that his post-conviction counsel's ineffective assistance provided cause for procedural default of three additional constitutional claims. Finally, Mr. Simpson maintains that the district court erred in holding that an eighth amendment mental retardation claim based on *Atkins v. Virginia,* 526 U.S. 304 (2002), can be defaulted by an omission that occurred before *Atkins* was decided.

II.

Mr. Simpson argues that his eighth amendment right to be free from cruel and unusual punishment was violated when the trial court refused to instruct the jury that it could consider Mr. Harrison's sentence as a mitigating circumstance in sentencing Mr. Simpson. As we have said, before Mr. Simpson's trial, Mr. Harrison, who was initially charged with the capital murder of the two victims, entered a plea of guilty to two counts of second-degree murder and received a sentence of twenty years' imprisonment on each count; the sentences were to run consecutively. Mr. Simpson's attorney asked the trial judge for an instruction that "[c]o-defendant . . . although initially charged with the capital murder of Garner, through a plea bargain with the State, plead [sic] guilty to Murder in the Second Degree . . . and received a twenty (20) year sentence." Defense counsel asked for another, similar instruction to be given regarding the murder of Ms. Pennington. The state objected on the bases that Mr. Harrison's sentence was irrelevant to

Mr. Simpson's guilt, innocence, and subsequent punishment, and that the requested instructions were misleading in failing to say that Mr. Harrison's two sentences were to run consecutively. The trial court agreed with both of the state's arguments and refused to give the jury instructions. On direct appeal, the Arkansas Supreme Court agreed with the trial court's decision on both grounds. *Simpson,* 339 Ark. at 473-74, 6 S.W.3d at 109.

The provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) govern our review of the state court's decision. Under AEDPA, as relevant here, we cannot grant a writ of habeas corpus to Mr. Simpson unless the Arkansas courts' treatment of his federal claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). In interpreting this statute, the Supreme Court has held that a "federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor,* 529 U.S. 362, 411 (2000).

Mr. Simpson argues that refusing his proffered instructions was contrary to the principles established in *Lockett v. Ohio,* 438 U.S. 586 (1978), and *Eddings v. Oklahoma,* 455 U.S. 104 (1982). In *Eddings,* the Supreme Court held that a sentencer

cannot "'be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Id.* at 110 (quoting *Lockett,* 438 U.S. at 604 (plurality opinion)) (emphasis in *Lockett*). The Arkansas Supreme Court held that Mr. Harrison's sentence was not information that had to be submitted to the jury as a mitigating factor because Mr. Harrison's sentence did not shed light on Mr. Simpson's character, record, or the circumstances of the offense. This seems to us to be quite evidently correct, so we cannot conclude that the court's application of *Eddings* constituted a holding contrary to or involved an unreasonable application of clearly established federal law. We therefore reject this claim.

III.

We turn now to Mr. Simpson's claim that the sixth and fourteenth amendments of the Constitution entitled him to effective assistance of counsel in his Arkansas capital post-conviction proceeding, that he received ineffective assistance, and that this provides cause for the procedural default of the rest of his claims.

In *Coleman v. Thompson,* 501 U.S. 722, 752 (1991), the Court stated that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." The Court further observed that this

rule had been applied to capital cases, *see Murray v. Giarratano,* 492 U.S. 1, 7, 10 (1989), and that where there is no constitutional right to counsel there can be no deprivation of effective assistance, *see Wainwright v. Torna,* 455 U.S. 586, 587-88 (1982) (per curiam).

Mr. Simpson maintains, however, that because Arkansas Rule of Criminal Procedure 37.5 ("Special Rule for Persons Under Sentence of Death") required the state to appoint an attorney to represent him in post-conviction proceedings, the state had a duty to provide him with effective assistance of counsel and its failure to do so deprived him of due process. He relies on *Hicks v. Oklahoma,* 447 U.S. 343, 345-47 (1980), where the Supreme Court held that when state law guaranteed a convicted defendant that his punishment would be fixed by a jury, denying him this right was a deprivation of liberty without due process of law.

We disagree because we think that the Supreme Court essentially rejected this idea in a case similar to Mr. Simpson's. In *Pennsylvania v. Finley,* 481 U.S. 551 (1987), as here, counsel was provided to the defendant in state post-conviction proceedings as required by state law. The defendant's attorney in *Finley* was later permitted to withdraw after he concluded that there were no arguable bases for collateral review; the state court later dismissed the defendant's petition for post-conviction relief. After the state appellate court reversed the dismissal based on counsel's failure to follow the pre-withdrawal procedures set forth in *Anders v. California,* 386 U.S.

738 (1967), the Supreme Court granted *certiorari* and reversed the state appellate court. *Finley,* 481 U.S. at 553-54.

The Court held that the *Anders* requirements were based on an indigent defendant's fourteenth amendment right to counsel in a first appeal and that those requirements did not apply to the defendant since there was no constitutional right to counsel in a collateral attack on a conviction. The Court rejected the contention that a "right to counsel" created by a state gives rise to a constitutional guarantee: "[I]t is the source of the right to a lawyer's assistance, combined with the nature of the proceeding, that controls the constitutional question. In this case, respondent's access to a lawyer is the result of the State's decision, not the command of the United States Constitution." *Finley,* 481 U.S. at 555-56. The Court further explained that "the State has made a valid choice to give prisoners the assistance of counsel [in post-conviction proceedings] without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position – at trial and on first appeal as of right." *Id.* at 559. The Supreme Court has thus left little doubt as to its view that a state's decision to grant a right to counsel in post-conviction proceedings does not give rise to a due process claim if counsel performs deficiently.

In addition, we have stated that *Hicks* "represent[s] a rather narrow rule: some aspects of the sentencing process, created by state law, are so fundamental that

the state must adhere to them in order to impose a valid sentence." *Chambers v. Bowersox,* 157 F.3d 560, 565 (8th Cir. 1998), *cert. denied,* 527 U.S. 1029 (1999). And we have distinguished *Hicks,* which "involved the violation of a state procedural rule concerning criminal sentencing, an area in which a defendant is entitled to constitutional protections," from "the alleged violation of a state rule concerning post-conviction proceedings, an area in which a defendant is not necessarily afforded constitutional protections." *Smith v. Lockhart,* 882 F.2d 331, 334 (8th Cir. 1989), *cert. denied,* 493 U.S. 1028 (1990). We also note that Rule 37.5 requires that attorneys appointed to represent persons sentenced to death in post-conviction proceedings meet certain qualifications, and Mr. Simpson has not challenged his counsel's qualifications.

We therefore reject Mr. Simpson's claim that he was denied effective assistance of counsel.

IV.

Mr. Simpson claimed for the first time in his § 2254 petition that his constitutional rights were violated at sentencing because neither the trial court nor trial counsel submitted relevant mitigating circumstances of impairment as a result of drug abuse or intoxication and "relatively minor participation"; because the jury found that no mitigating circumstances were presented when in fact they were; and because the trial court admitted irrelevant victim

impact testimony. But he procedurally defaulted all three of these claims since he did not raise them in his state court post-conviction proceedings. And, as we have already said, he has no claim of ineffective assistance that would have provided cause and prejudice to defeat the procedural bar. *See Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991); *Interiano v. Dormire,* 471 F.3d 854, 856-57 (8th Cir. 2006). We reject these claims.

V.

We now consider Mr. Simpson's final contention, namely that the district court erred in holding that he had defaulted an eighth amendment claim under *Atkins* that his mental retardation made him ineligible for the death penalty. The district court denied Mr. Simpson's *Atkins* claim without a hearing because "before trial, at trial, or in his post-conviction petition," he did not present a mental retardation defense to the death penalty (a defense that was available to him under state law, *see* Ark. Code § 5-4-618), *Simpson,* 2006 WL 1520628, at *10, and because he failed to show that "the facts underlying [his] claim would be sufficient to establish by clear and convincing evidence that but for constitutional error," 28 U.S.C. § 2254(e)(2)(B), "no reasonable factfinder would have found him to be eligible for the death penalty under *Atkins*," *Simpson,* 2006 WL 1520628 at *12.

We think, contrary to the district court's holding, that the availability of a similar claim under Arkansas law is irrelevant to our consideration here: Mr. Simpson is raising a previously unavailable federal claim, and that claim is separate and distinct. We conclude, moreover, that because the state claim is distinct from the eighth amendment claim, the district court incorrectly required Mr. Simpson to meet the requirements of § 2254(e)(2) before holding an evidentiary hearing. By its terms, that section applies only if the petitioner "failed to develop the factual basis of [his] claim in State court," *id.*, and the Supreme Court has held that "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel," *Williams v. Taylor*, 529 U.S. 420, 431-32 (2000). Since *Atkins* created a previously unavailable claim based on the unconstitutionality of executing the mentally retarded, Mr. Simpson can hardly be said to have lacked diligence in developing the factual basis of that claim in state court.

Mr. Simpson asks us to remand his case to the district court for an evidentiary hearing. When the Supreme Court works a change in the law, the decision whether to remand a habeas corpus claim based on that change to the appropriate state court or to the federal district court hinges on whether the state court will entertain the claim. *Cf. Whippler v. Balkcom*, 342 F.2d 388, 390 (5th Cir. 1965); 17B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper,

Vikram David Amar, *Federal Practice and Procedure* § 4264.4 (3d ed. 2007). The Arkansas Supreme Court has made it clear that it will not recall a mandate affirming a death sentence to consider a post-*Atkins* mental retardation claim when the defendant has failed to raise a mental retardation defense under the Arkansas statute. *See Coulter v. State,* 365 Ark. 262 (2006), 2006 WL 301082 (citing *Engram v. State,* 360 Ark. 140, 200 S.W.3d 367 (2004)). We therefore conclude that any remand here would have to be to the district court.

"Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court." *Townsend v. Sain,* 372 U.S. 293, 312 (1963), *overruled on other grounds, Keeney v. Tamayo-Reyes,* 504 U.S. 1, 5-6 (1992). Mr. Simpson has alleged that he is mentally retarded as *Atkins* defines that condition, which would entitle him to relief, and that matter remains in dispute. Since his inability to present his *Atkins* claim in state court precluded him from receiving "a full and fair evidentiary hearing" there, he satisfies the conditions outlined in *Townsend.*

We therefore vacate the judgment of the district court and remand the case for further proceedings. We note that our reasoning closely parallels that of the Fourth Circuit in its decision to remand an *Atkins* claim in *Walker v. True,* 399 F.3d 315, 326-27 (4th Cir. 2005), where the petitioner likewise did not have the opportunity to present that claim in the state court.

On remand, the district court should give Mr. Simpson the chance to develop the factual basis of his claim and present it at an evidentiary hearing. The court must then determine whether Mr. Simpson meets the conditions for relief under *Atkins*.

VI.

We therefore reverse the judgment and remand this case to the district court for further proceedings.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

CAPITAL CASE

SEDRICE MAURICE SIMPSON PETITIONER

v. No. 5:04-CV-00429 JLH

LARRY NORRIS, Director,
Arkansas Department of Correction RESPONDENT

OPINION AND ORDER

Sedrice Maurice Simpson was convicted of two counts of capital murder by a jury in the Circuit Court of Dallas County, Arkansas, in 1998. He was sentenced to death. He petitions this Court for a writ of habeas corpus.

Simpson asserts that he is entitled to relief on eight separate grounds: (1) his Sixth and Fourteenth Amendment rights were violated when the trial court erroneously permitted the use of two custodial statements against him; (2) he is ineligible for the death penalty because he is mentally retarded; (3) his Sixth and Fourteenth Amendment rights were violated because he did not receive effective assistance from post-trial counsel; (4) his Eighth Amendment rights were violated by the trial court's failure to instruct the jury that the co-defendant's lesser sentence could be considered a mitigating circumstance; (5) his Eighth Amendment rights were violated by the trial court's failure and his attorney's failure to submit two

different mitigating circumstances; (6) his Eighth Amendment rights were violated by the jury finding that no mitigating circumstances were presented, when in fact they were presented; (7) his Sixth, Eighth and Fourteenth Amendment rights were violated by the stationing of numerous uniformed law enforcement officers around him during the penalty phase arguments; and (8) his Eighth and Fourteenth Amendment rights were violated by the trial court permitting the introduction of irrelevant victim impact testimony.

I. THE FACTS OF THE CASE.

The facts of this case were recounted by the Arkansas Supreme Court on direct appeal from Simpson's conviction:

> In the early morning hours of June 20, 1997, the H & H Grocery in Holly Springs was robbed and the two women working there, [Wendy] Pennington and [Lena] Garner, were shot and killed with a 12-gauge shotgun. About an hour later, Sedric Simpson hurriedly went to see Bernard Gregory and left a 12-gauge and some blood-covered money with him; Gregory later testified that, at this same time, he also saw blood on Simpson's hands. After seeing Gregory, Simpson went to the home of Frederick Wright in Sparkman and told Wright that he had just "offed two bitches." Simpson was later arrested at Wright's house. After being advised of his *Miranda* rights and taken to

> jail, Simpson signed a waiver-of-rights form and gave a statement implicating his co-defendant Ezekiel Harrison. The officers taking the statement said that Simpson did not appear to be under the influence of drugs or alcohol at the time. Later, Simpson's mother reported that two guns were missing from the trunk of the car that Simpson had been driving, so the Dallas County officers searched the car and seized evidence from it. Simpson had taken the car, which actually belonged to his sister, from his mother's house without her knowledge or permission.
>
> At the end of a three-day jury trial in May of 1998, Simpson was convicted of two counts of capital murder. The jury found three aggravating factors – (1) the murders were committed for the purpose of avoiding or preventing an arrest, (2) the murders were committed for pecuniary gain, and (3) Simpson caused the death of more than a single person in the same criminal episode – and no mitigating factors. Simpson was sentenced to death by lethal injection.

Simpson v. State, 339 Ark. 467, 469-70, 6 S.W.3d 104, 106-07 (1999). Harrison pled guilty to second degree murder and was sentenced to two 20-year terms of imprisonment to run consecutively. He testified against Simpson. Simpson's and Harrison's versions of the murders are substantially the same except that each one claims that the other one fired the shotgun at Pennington and Garner. Harrison testified that he was outside pumping gas when Simpson, without

telling Harrison, took the shotgun, went into the store, and fired the shots, after which Simpson exited with the cash register and with blood on his hands. Simpson testified that he was outside putting air in a tire when Harrison, without telling Simpson, took the shotgun, went into the store, and fired the shots, after which Harrison exited with the cash register. The jury apparently believed Harrison.

II. SIMPSON PURSUED POST-CONVICTION RELIEF IN THE STATE COURTS.

Simpson petitioned for post-conviction relief under Rule 37.5 of the Arkansas Rules of Criminal Procedure. The circuit court denied the petition as untimely. The Arkansas Supreme Court reversed and remanded with instructions to reinstate the petition, conduct a hearing, and make specific findings of fact and conclusions of law. *Simpson v. State,* 347 Ark. 564, 65 S.W.3d 878 (2002). The circuit court conducted a hearing and entered an order denying Simpson's request for post-conviction relief. The Arkansas Supreme Court affirmed the denial of post-conviction relief in *Simpson v. State,* 355 Ark. 294, 138 S.W.3d 671 (2003).

III. TWENTY-EIGHT U.S.C. § 2254 LIMITS THE AUTHORITY OF THIS COURT IN ITS REVIEW OF SIMPSON'S CASE.

Section 2254 of Title 28 of the U.S. Code permits a prisoner in state custody to petition a federal court

for a writ of habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

The Supreme Court explained in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), that to obtain federal habeas relief, a petitioner must first demonstrate that his case satisfies the condition set by § 2254(d)(1):

> [Section] 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or

> (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412, 120 S. Ct. at 1523 (omission in original). The purpose of § 2254(d) as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 is to limit the scope of federal court review "in order to effect the intent of Congress to expedite habeas proceedings with appropriate deference to state court determinations." *Whitmore v. Kemna,* 213 F.3d 431, 433 (8th Cir. 2000).

A state-court decision will be viewed as contrary to clearly established federal law if the state court has applied a rule that directly contradicts a decision of the United States Supreme Court or has reached a result opposite to a result reached by the United States Supreme Court on materially indistinguishable facts. *Kinder v. Bowersox,* 272 F.3d 532, 537-38 (8th Cir. 2001). A state-court decision will be viewed

as an unreasonable application of clearly established federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. *Williams,* 529 U.S. at 413, 120 S. Ct. at 1523. "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams,* 529 U.S. at 409, 120 S. Ct. at 1521. "[W]e must remember that unreasonable is not the same as incorrect. The state court's application might be erroneous, in our 'independent judgment,' yet not 'unreasonable.'" *Kinder,* 272 F.3d at 538 (quoting *Williams,* 529 U.S. at 411, 120 S. Ct. at 1522).

A habeas petitioner may also seek relief on the ground that the state court made an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2). The state court's findings of fact are presumed to be correct. *Id.* at § 2254(e)(1). The petitioner has the burden of rebutting that presumption by clear and convincing evidence. *Id.*; *Kinder,* 272 F.3d at 538.

Before bringing his claims to this Court, a petitioner must have presented his claims in state court. *Baldwin v. Reese,* 541 U.S. 27, 29, 124 S. Ct. 1347, 1349, 158 L.Ed.2d 64 (2004). The Eighth Circuit has explained:

> A prisoner seeking a writ of habeas corpus from a federal court must first fairly present

> his claims to the state courts in order to meet the exhaustion requirement of 28 U.S.C. § 2254(b). We have held repeatedly that a claim has not been fairly presented to the state courts unless the same factual grounds and legal theories asserted in the prisoner's federal habeas petition have been properly raised in the prisoner's state court proceedings. We have also held that a claim is considered exhausted when the petitioner has afforded the highest state court a fair opportunity to rule on the factual and theoretical substance of his claim.

Krimmel v. Hopkins, 56 F.3d 873, 875-76 (8th Cir. 1995) (internal citations and quotation marks omitted). "In order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in a claim before the state courts." *McCall v. Benson,* 114 F.3d 754, 757 (8th Cir. 1997) (citation and internal quotation marks omitted).

Even when a petitioner has met the exhaustion requirement, the federal court may still be prevented from considering the federal habeas claim if it has been procedurally defaulted. "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson,* 501 U.S. 722, 732, 111 S. Ct. 2546, 2555,

115 L.Ed.2d 640 (1991). A claim may be lost due to procedural default at any level of state-court review: at trial, on direct appeal, or in the course of state post-conviction proceedings. *Kilmartin v. Kemna,* 253 F.3d 1087, 1088 (8th Cir. 2001). Another judge of this Court has explained:

> A petitioner's claim may also be procedurally defaulted for failure to present the claim to the state courts entirely. "[W]here a federal habeas petitioner raises a claim which has *never* been presented in any state forum, a federal court may properly determine whether the claim has been procedurally defaulted under state law, such that a remedy in state court is unavailable. . . ." *Harris v. Reed,* 489 U.S. 255, 268-270, 109 S. Ct. 1038, 103 L.Ed.2d 308 (1989) (O'Connor, J., concurring); 28 U.S.C. § 2254(c). In other words, if the petitioner "failed to exhaust state remedies and the [state] court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred[,]" for purposes of federal habeas review, the petitioner's claim is considered procedurally defaulted. *Coleman,* 501 U.S. at 735 n. 1, 111 S. Ct. 2546. Here, too, the federal court cannot consider the petitioner's claim unless the petitioner can "excuse" the procedural default.
>
> A petitioner can "excuse" the procedural default of his claims in state court, and obtain federal habeas review of those claims, only if

> the petitioner can demonstrate either: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that the failure to consider the claim will result in a fundamental miscarriage of justice, such as the conviction of one who is actually innocent. *Murray,* 269 F.3d at 898; *Fann v. Bowersox,* 247 F.3d 841, 843 (8th Cir. 2001). "Cause" for the procedural default exists, for example, when counsel has been constitutionally ineffective or when an objective, external impediment prevented counsel from complying with the state's procedural rule. *Murray v. Carrier,* 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986). To demonstrate prejudice, a petitioner must show "not merely that the errors at trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions . . . [such that he] was denied fundamental fairness at trial." *Murray,* 477 U.S. at 494, 106 S. Ct. 2639 (internal quotation and punctuation omitted).

Noel v. Norris, 194 F. Supp. 2d 893, 903 (E.D. Ark. 2002) (alterations in original).

IV. SIMPSON ASSERTS EIGHT CLAIMS FOR HABEAS RELIEF.

A. Claim #1: Simpson claims that two involuntary custodial statements were used against him unconstitutionally.

Simpson first claims that the trial court violated his constitutional rights when it allowed the use of two involuntary custodial statements.

(1) The Written Statement.

The first statement was given by Simpson shortly after his arrest and was reduced to writing by a law enforcement officer. R. at 433-34, 487-89. In the written statement, Simpson admitted that he was present at the store with Harrison when the murders were committed. However, Simpson denied that he shot the two women and told police that Harrison had done so. The written statement was not introduced into evidence, but the prosecutor told the jury about it in opening statement. Simpson asserts that the trial court erred by allowing the use of the statement. On direct appeal, the Arkansas Supreme Court addressed Simpson's claim in its opinion and found no error. The court said:

> Simpson's third argument for reversal is that the trial court erred in denying his motion to suppress his custodial statement. He asserts that even though he was advised of his *Miranda* rights, his statement was given in an environment that was hostile, threatening,

and coercive. The sheriff had told Simpson at the time of his arrest that he was "going to see [Simpson] fry" for killing the two women, and the uncle of one of the victims was present for part of Simpson's interview. Because of these circumstances, he argues that it was error for the trial court to allow his statement into evidence.

The difficulty with this argument, however, is that the trial court never allowed Simpson's statement to be introduced into evidence. Although Simpson attempted to lay a foundation and introduce the statement during the testimony of the officer who took it, the prosecutor objected on the basis of hearsay. The objection was sustained, and the statement was never admitted into evidence. Because Simpson's statement was never used at trial, he cannot demonstrate prejudice. *Hayes v. State,* 274 Ark. 440, 447, 625 S.W.2d 498, 502 (1981). In that case, Hayes argued that the court erred in finding that a statement was given voluntarily. However, because the statements were not introduced at trial, the court said, "we fail to perceive nor has appellant demonstrated how he was prejudiced by the non-use of these statements." *Id.*

Even assuming that Simpson had been able to demonstrate some kind of prejudice, the State has met its burden of showing by a preponderance of the evidence that the statement was voluntarily given. *Id.* at 445, 625 S.W.2d at 501. This court makes an independent

> determination based on the totality of circumstances surrounding the statement, and we will not reverse a trial court's finding of voluntariness unless clearly against the preponderance of the evidence. *Id.* At the hearing on the suppression motion, five Dallas County officers testified that Simpson voluntarily signed the *Miranda* form and the waiver-of-rights form; several of them also testified that Simpson did not appear to be under the influence of drugs or alcohol at the time. Although Simpson testified that he felt coerced, the trial court found that he knowingly and voluntarily gave the statement. As in *Hayes,* it was for the trial court to resolve the credibility of the witnesses and any conflict in their testimony, *Hayes,* 274 Ark. at 446-47, 625 S.W.2d at 501, and that court's finding of voluntariness was not clearly against the preponderance of the evidence.

Simpson, 339 Ark. at 471-72, 6 S.W.3d at 107-08. Simpson claims that the Arkansas Supreme Court's decision was contrary to federal precedent.

Simpson's argument regarding the written statement is without merit. First, as noted above, the statement was never introduced into evidence. Simpson offered the statement into evidence, but the court sustained the prosecutor's hearsay objection. R. at 1493. Second, the mention of the statement during the prosecutor's opening statement was not prejudicial. When Simpson's lawyer made his opening statement, he told the jury what happened that night, repeating the version of the facts that the prosecutor

had attributed to Simpson's written statement. *Id.* at 1094. Simpson testified in his own defense, and on direct examination he reiterated the substance of the statement as the prosecutor had recounted it. The statement contained Simpson's version of events the night of the murders: Harrison shot Pennington and Garner without his knowledge while he was putting air in a tire. The opening statement by Simpson's lawyer and Simpson's testimony reiterated this account of the facts. *See id.* at 1504-75. The prosecutor's remarks about the written statement accurately summarized Simpson's defense; those remarks were not prejudicial to Simpson. Third, from a review of the totality of the circumstances, Simpson has failed to show by clear and convincing evidence that the state courts erred in finding that the statement was voluntarily given. 28 U.S.C. § 2254(e)(1).

Simpson's claim that the written statement was involuntary is dismissed.

(2) The Oral Custodial Statement.

The second statement was made orally to a jailer while Simpson was being transported. Simpson challenges the use of the oral custodial statement during the opening statement by the prosecutor. The transcript contains the following:

> Prosecutor: After he had left that morning and while he was being transported to El Dorado, he was in the back seat of the car

and the two individuals, the two men that were transporting him, the bailiff and one of the 309's, one of the gentlemen from down there who help around the jail they were having a conversation –

Simpson's Lawyer: Your Honor, may we approach, please? I hate to object during the Opening Statement and I apologize to the jury, but I'd like to object and approach, your Honor.

(WHEREUPON, THE OBJECTION WAS MADE AT THE BENCH:)

Simpson's Lawyer: Your Honor, I don't think that statement has any relevance whatsoever. It is simply a statement, I believe, that, "The girl will not be cooking hamburgers any more," it's not an admission of any sort. It is simply an out of court statement and it doesn't have any relevance to any of the facts, the elements of the crime that are at issue here. The only thing that it could serve to do is inflame the jury.

Prosecutor: Whether or not it's an admission of guilt or it has any relevance with regard, that is a jury question, because [it's]

	the same phrase that he used earlier when he confessed to Frederick Wright.
The Court:	What phrase?
Simpson's Lawyer:	That's not what the statement was. The statement is this (indicating). That word is not in the statement. The word is not in the statement. If that word is in the statement – That word is not in the statement and that makes all the difference in the world. It is not the same statement, it is not the same language. It's simply stating that she won't cook hamburgers any more, "Won't cook any more hamburgers any more." That has nothing to do –
Prosecutor:	The statement is that, "Them bitches won't cook no more."
The Court:	Objection overruled.
Simpson's Lawyer:	For the record, Your Honor, does it matter whether or not he said, "Bitches."
The Court:	No.
The Court:	I don't know what the statement says.
Simpson's Lawyer:	Thank you.

The Court: There should have been a ruling to suppress that if you wanted to suppress that and there's been no motion at all. I don't know what the full statement says.

Prosecutor: It is admissible, regardless of whether the word "Bitches" is in it or not. It's still admissible.

Simpson's Lawyer: I just wanted a ruling. We have the statement and that's why we waited. It does not make any difference unless it does not.

The Court: Overruled.

Simpson's Lawyer: Thank you. I apologize.

(WHEREUPON, THE HEARING CONTINUED AS FOLLOWS:)

Prosecutor: After Mr. Simpson was arrested and while he was being transported to El Dorado, the people that were doing the driving and were transporting him there, they had a conversation about this place. They were just talking about that convenience store and the hamburgers and the fact that they knew the girls and – at least one of them knew the girls – and what had gone on

> and that it was a tragedy and that it was too bad, and that they had made some really good hamburgers. Mr. Simpson chimed in with his thoughts on the matter to the effect – and I'll let the witness tell you exactly what he said – but to the effect, "Well, the bitches aren't cooking no more."

R. at 1088-91. The prosecutor's statement actually conflated the testimony of two witnesses. Alan McClain, a jailer, testified without objection to a conversation that occurred while he and an Act 309 trustee were transporting Simpson to jail. During the transport, McClain commented to the Act 309 trustee that the older of the two victims "used to cook some good hamburgers," and Simpson stated, "She won't cook no damn more." *Id.* at 1467. Frederick Wright, Simpson's cousin, testified that Simpson came to his house at about 6:30 a.m. on the morning of the murder and said, "I just shot two bitches." *Id.* at 1130. Wright's testimony also was received without objection.

Simpson claims that the prosecutor's use of the oral custodial statement violated his constitutional rights for two reasons. First, he claims that the oral custodial statement was the fruit of an illegal interrogation. Simpson's habeas petition states that he was possibly prodded and perhaps threatened before he made the statement. Pet. Writ Habeas Corpus at

10. At trial, Simpson's lawyer objected only that the statement was irrelevant and that the effect would be to inflame the jury by attributing to Simpson a statement that described the victims as "bitches." Simpson's lawyer did not argue at trial that the statement was involuntary. R. at 1090. Here, Simpson cites no evidence that would be sufficient to show that the statement was made involuntarily.

Second, Simpson claims that it was constitutional error to use the statement because the prosecutor misled the jury. Not every improper comment made by a prosecutor violates the Constitution:

> Prosecutorial misconduct does not always warrant the granting of a mistrial. The Supreme Court has acknowledged that given "the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *United States v. Hasting,* 461 U.S. 499, 508-09, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983). Thus, the Supreme Court has held that an appellate court should not exercise its "[s]upervisory power to reverse a conviction . . . when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." *Id.* at 506, 103 S. Ct. at 1979.
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> * * *
>
> In determining prejudice, we consider the scope of the objectionable comments and

> their relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant's conviction. As the Supreme Court has emphasized "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context." *United States v. Young,* 470 U.S. [1,] 11, 105 S.Ct. [1038,] 1044[, 84 L.Ed.2d 1 (1985)] (finding harmless error where the prosecutor had stated his opinion that the defendant was guilty and urged the jury to "do its job").

United States v. Zehrbach, 47 F.3d 1252, 1265 (3d Cir. 1995) (footnote omitted). In *United States v. Bowman,* 353 F.3d 546, 551 (7th Cir. 2003), the Seventh Circuit addressed a comparable situation, stating:

> Bowman alleges that the prosecutor made numerous inappropriate propensity arguments during the opening statement and closing argument by stating, for example, that Bowman was a convicted felon; that he carried an unregistered, loaded gun with a "bullet in the chamber;" that he carried marijuana; and by listing the various traffic violations discovered as a result of the police stop. According to Bowman, these comments improperly led the jury to conclude that because he was guilty of past or other crimes, he must be guilty of illegally possessing a firearm. We are unconvinced. All of the statements made by the prosecutor were either based on stipulated facts or facts that

> were testified to, without objection, during trial. The prosecutor used these facts for permissible purposes – for example, to reiterate the narrative told by the police officers with regard to the traffic stop. *See* [*United States v.*] *Sandoval,* 347 F.3d [627,] 631 [(7th Cir. 2005)] (finding that the prosecutor's statements during opening, closing and sentencing accurately reflected witness testimony and thus were supported by the evidence and not improper). The prosecutor neither misrepresented the witnesses' testimony or the parties' stipulations, nor asked the jury to draw the inference that because Bowman had admitted problems abiding by the law, he must be guilty of the crime in question. The statements were therefore proper.

Bowman, 353 F.3d at 551.

Here, the prosecutor's statement was based on testimony that was received into evidence without objection. R. at 1130-31, 1135, 1468. Although the prosecutor conflated two different statements, there is no evidence that she intentionally misled or made false statements to the jury. The prosecutor stated that she was paraphrasing and would let the witnesses testify as to exactly what Simpson said. The circuit court instructed the jury that opening statements were not evidence. *Id.* at 1585. The potentially more prejudicial aspect of the prosecutor's comment was that she attributed to Simpson the use of the term "bitches" to refer to the victims; but Wright

testified without objection that Simpson said that he had shot two "bitches." The record as a whole does not show prosecutorial misconduct or prejudice to Simpson.

Simpson has failed to meet his burden under 28 U.S.C. § 2254. He failed to present the claim to the Arkansas Supreme Court and preserve the issue for review. Even if it were not procedurally defaulted, Simpson has failed to prove that any constitutional violation occurred.

Simpson's claim that the oral custodial statement was used unconstitutionally is dismissed.

B. Claim #2: Simpson claims that he is ineligible for the death penalty because he is mentally retarded.

Simpson next claims that he is not eligible for the death penalty because of the Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). In *Atkins,* the Court held:

> Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mental retarded criminals will measurably advance the deterrent or the retributive purpose of the

> death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

Atkins, 536 U.S. at 321, 122 S. Ct. at 2252. The Arkansas legislature was one of the legislatures cited by the Supreme Court in *Atkins* as having enacted legislation to prohibit the execution of mentally retarded persons. *Id.* at 314, 122 S. Ct. at 2248 (citing ARK. CODE ANN. § 5-4-618). In interpreting *Atkins,* the Arkansas Supreme Court has stated:

> We believe that the court in *Atkins* merely reaffirmed this State's preexisting prohibition against executing the mentally retarded. Section § 5-4-618(b), which is part of Act 420 of 1993, provides that no defendant with mental retardation at the time of committing capital murder shall be sentenced to death.

Anderson v. State, 357 Ark. 180, 216, 163 S.W.3d 333, 354-55 (2004).

The Arkansas statute creates a procedure by which a defendant can show that he is mentally retarded and avoid the death penalty. It provides, "A defendant on trial for capital murder shall raise the special sentencing provision of mental retardation by motion prior to trial." ARK. CODE ANN. § 5-4-618(d)(1). "If such motion is filed, the trial court must determine prior to trial whether the defendant is in fact

mentally retarded." *Rankin v. State,* 329 Ark. 379, 390, 948 S.W.2d 397, 402-03 (1997) (citing *id.* at § 5-4-618(d)(2)). Simpson never invoked this statute. He did not invoke the statute before trial, at trial, or in his post-conviction petition. He never asserted that he is mentally retarded until he filed his habeas petition in this Court.

Twenty-eight U.S.C. § 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Simpson's claim arguably relies on a new rule of constitutional law that has been made retroactive to cases on collateral review. *Hill v. Anderson,* 300 F.3d 679, 681 (6th Cir. 2002). However, because Ark. Code

Ann. § 5-4-618 was in effect, he had ample opportunity to develop the factual basis for his claim of mental retardation but never did so.

Moreover, Simpson has not shown that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have imposed the death penalty. His attorneys state in the habeas petition that they believe Simpson is retarded, but the record contains no evidence that he is. Simpson's own testimony and that of his family do not support the allegation that he is mentally retarded. Simpson testified at the guilt phase of the trial and at the hearing on his petition for post-conviction relief. R. at 1504-75; Post-Conviction Tr. at 30-62. Simpson understood the questions asked of him and gave responsive answers on direct and cross-examination on both occasions that he testified. It is apparent from the transcript that he comprehended the proceedings and the issues. Simpson's mother and sister testified at the penalty phase but never described Simpson as having any impairment. According to Simpson's mother, he is the father of two children, had custody of the children before his arrest, and provided support for the children.

Furthermore, before trial the circuit court referred Simpson for psychological evaluation to determine "the mental condition of the defendant," his capacity to understand the proceedings against him and to assist effectively in his own defense, and the extent to which his capacity to appreciate the

criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time of the murders. R. at 597-98. The psychological examiner stated:

> *Clinical Evaluation*
>
> When Mr. Sedrice Simpson was brought to the examination by a Dallas County sheriff's deputy from the jail at El Dorado, he was noted to be wearing neat and clean orange jail clothing. His grooming and hygiene were good. He identified himself as Sedrice Maurice Simpson, age 26, and was able to give his date of birth, social security number, address including zip code and a detailed history and background information. Mr. Simpson was found to be oriented to time, place and person with no evidence of any unusual thought process on the date of examination. *He appeared to be functioning within the average normal range of intelligence and had a good command of the language, as well as well developed social skills.* He was courteous and appropriate throughout the interview and appeared to be a healthy and functional specimen of a 26 year old man. His posture and gait were normal and he appeared to understand everything that was said to him. There was no evidence of any delusional thought, hallucinatory activity or any perceptual disturbances. He did not appear to be depressed nor anxious. He appeared confident that he will be found not guilty of the charges against him. He is aware of the seriousness of the allegations

against him and the potential ramifications which may occur.

Legal Questions

1. Competency to Stand Trial. Mr. Sedrice Maurice Simpson apparently has a good understanding of the roles of the judge, the prosecuting attorney, the defense attorney and the jury, as well as his own role in the courtroom. He has a clear understanding that the judge is in charge of the entire proceedings and order in the court. He also understands the function of witnesses and his own role in assisting his attorney in his defense. He understands about the consequences of behavior, sentencing if found guilty and the right to appeal a verdict. Mr. Simpson is currently able to understand rationally and factually the legal proceedings against him and is currently able to assist his attorney effectively in his own defense. Thus, it is recommended that Sedrice Maurice Simpson be adjudicated competent to stand trial.

2. The Issue of Criminal Responsibility. Mr. Sedrice Maurice Simpson reported that he had smoked crack cocaine voluntarily and recreationally periodically throughout the night preceding his arrest. While his judgment may very well have been influenced by the heavy drug usage, it must be remembered that he voluntarily took those drugs and had done so periodically and repeatedly for the past one and one-half years. He

> should, therefore, have had an adequate understanding of his ability to function while under the influence of crack cocaine.
>
> Throughout the interview Mr. Simpson talked repeatedly about his ideas of fair play and the fact that he does not believe his rights as a prisoner have been honored appropriately demonstrating his ability to understand the concepts of right and wrong. It is my professional opinion that Mr. Sedrice Maurice Simpson is at the present time and was at the time of the alleged offense able to conform his conduct to the requirements of law.

Resp. Pet. Writ Habeas Corpus Ex. 8 at 9-10 (emphasis added).

Simpson was incarcerated in 1990 and underwent a psychological evaluation at that time. He was tested using the MMPI. That report states, in pertinent part, "[t]his individual shows no strong tendency to exaggerate or hide problems. This suggests that intellectual functioning and judgment are likely to be within normal range." Resp. Pet. Writ Habeas Corpus Ex. 9 at 1.

The record does not permit a finding that the requirements of 28 U.S.C. § 2254(e)(2)(B) are met here. Simpson has not shown that the facts underlying his claim of mental retardation would be sufficient to establish that no reasonable factfinder would have found him to be eligible for the death penalty under *Atkins*.

Simpson's claim that he is ineligible for the death penalty because he is mentally retarded is dismissed.

C. Claim #3: Simpson claims that his Sixth and Fourteenth Amendment rights to the Constitution were violated because he did not receive effective assistance from his court-appointed post-trial counsel.

Simpson's next claim is that his court-appointed attorney did not provide adequate representation during his post-trial proceedings. The lawyer who represented Simpson in his Rule 37 petition was appointed by the circuit court pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedures. The United States Supreme Court has held:

> There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Murray v. Giarratano,* 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *See Wainwright v. Torna,* 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance).

Coleman, 501 U.S. at 752, 111 S. Ct. at 2566.

Simpson's lawyers are well aware that the Supreme Court has held that there is no constitutional right to an attorney in post-conviction proceedings. They argue, however, that when the state creates a right that is not conferred by the United States Constitution, the state has created a substantial and legitimate expectation, protected by the Due Process Clause, that defendants will be afforded its benefits. They cite *Hicks v. Oklahoma,* 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980); *Walker v. Deeds,* 50 F.3d 670 (9th Cir. 1995); *Wilkins v. Bowersox,* 933 F. Supp. 1496 (W.D. Mo. 1996); *Harris v. Wood,* 64 F.3d 1432 (9th Cir. 1995); *Fetterly v. Paskett,* 997 F.2d 1295 (9th Cir. 1993); and *Lee v. Norris,* 354 F.3d 846 (8th Cir. 2004).

In other words, Simpson's argument is that, while the Constitution does not guarantee a right to counsel in post-conviction proceedings, if the state creates a right to counsel in post-conviction proceedings, a defendant then has a constitutional right to effective representation by the lawyer appointed to represent him in those proceedings. None of the cases he cites so holds. Simpson's argument was raised in *Lee v. Norris,* but the Eighth Circuit stated, "[w]e express no view at the present time on the merits of this argument." 354 F.3d at 847. Twenty-eight U.S.C. § 2254(i) provides, "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." That provision makes no exception for post-conviction

proceedings in which the defendant is represented by court-appointed counsel.

Assuming, *arguendo,* that a federal court can grant habeas relief for ineffective assistance of counsel during post-conviction proceedings, Simpson's petition fails to show that he is entitled to such relief. To prevail on a claim of ineffective assistance of counsel, a defendant must show that the lawyer's performance fell below professional standards of competence and that the deficient performance prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Simpson points to numerous issues in his petition filed here that were procedurally defaulted because they were not raised in his Rule 37 petition, but he does not show that any of those claims have merit. Because Simpson has not shown that any of these defaulted issues have merit, he has not shown that it was incompetent for his lawyer not to raise these issues in the Rule 37 petition or that the failure to raise them was prejudicial.

Simpson's third claim is dismissed.

D. Claim #4: Simpson claims that his Eighth Amendment rights were violated by the trial court's failure to instruct the jury that the co-defendant's lesser sentence could be considered as a mitigating circumstance.

Simpson's fourth claim is that his constitutional rights were violated by the trial court's failure to instruct the jury that his co-defendant's lesser sentence could be considered as a mitigating factor. The Eighth Circuit recognized that "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *United States v. Purkey,* 428 F.3d 738, 756 (8th Cir. 2005) (citations and internal quotation marks omitted). Likewise, the Arkansas Supreme Court has stated:

> The United States Supreme Court has held that it is a mandatory safeguard of the Eighth Amendment for the sentencing body to be allowed to consider any mitigating factor that is relevant to the particular offender's case. *California v. Brown,* 479 U.S. 538 [107 S.Ct. 837, 93 L.Ed.2d 934] (1987); *Roberts v. Louisiana,* 431 U.S. 633 [97 S.Ct. 1993, 52 L.Ed.2d 637] (1977); *Gregg v. Georgia,* 428 U.S. 153, [96 S.Ct. 2909, 49 L.Ed.2d 859] (1976). The defense must be allowed during the sentencing phase to introduce any relevant mitigating evidence the defense

> proffers concerning the character or history of the offender or the circumstances of the offense. *California v. Brown,* supra. Not only must relevant mitigating evidence be admitted, it must actually be considered, which in appropriate cases means specifically instructing the jury to do so. *Penry v. Lynaugh, supra*; *Eddings v. Oklahoma,* 455 U.S. 104 [102 S.Ct. 869, 71 L.Ed.2d 1] (1982). In other words, any death sentence that results from a deliberate exclusion of any relevant mitigating evidence is presumptively invalid. *Hitchcock v. Dugger,* 481 U.S. 393 [107 S.Ct. 1821, 95 L.Ed.2d 347] (1987).

Dansby v. State, 319 Ark. 506, 528, 893 S.W.3d 331, 343 (1995) (brackets in original).

Section 5-4-602(4)(A) of the Arkansas Code provides that in determining sentence in a capital case evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in § 5-4-604, any mitigating circumstances, or any other matter relevant to punishment, including, but not limited to, victim impact evidence, provided that the defendant and the state are accorded an opportunity to rebut such evidence. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but mitigation evidence must be relevant to the issue of punishment, including, but not limited to, the nature and circumstances of the crime, and the defendant's character,

background, history, and mental and physical condition as set forth in § 5-4-605. ARK. CODE ANN. § 5-4-602(4)(B). Section 5-4-605 provides:

A mitigating circumstance includes, but is not limited to, the following:

> (1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;
>
> (2) The capital murder was committed while the defendant was acting under an unusual pressure or influence or under the domination of another person;
>
> (3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
>
> (4) The youth of the defendant at the time of the commission of the capital murder;
>
> (5) The capital murder was committed by another person and the defendant was an accomplice and his or her participation was relatively minor; or
>
> (6) The defendant has no significant history of prior criminal activity.

Simpson proffered a verdict form for each of the two counts listing as a mitigating factor that the jury could find that Harrison, though initially charged

with capital murder, through a plea bargain entered a plea of guilty to second degree murder and received a sentence of 20 years imprisonment. The prosecutor objected, first, that the forms were misleading because Harrison was sentenced to two 20-year sentences to run consecutively and, second, that the sentence Harrison received was irrelevant. R. at 1697-98. The circuit court agreed with the prosecutor's argument. *Id.* at 1699. The record does not show that Simpson modified the instruction to avoid the confusion and requested the trial court to give the modified version. The Arkansas Supreme Court reviewed Simpson's claim regarding the mitigating circumstance and found no error. The court stated:

> There was no error in the court's refusal for two reasons. First, the proffered verdict forms were misleading and confusing. Simpson stated that Harrison had been sentenced to twenty years for each murder, but failed to indicate whether the sentences were being served consecutively or concurrently, or whether Harrison had also been convicted of and sentenced for robbery. Because the proffered forms could have misled and confused the jury, the trial court did not err by refusing to submit them. *See Townsend v. State,* 308 Ark. 266, 273, 824 S.W.2d 821, 825 (1992).
>
> Second, the disposition of Harrison's charges was not relevant to Simpson's punishment. Ark. Code Ann. § 5-4-602(4) (Repl. 1997) provides in pertinent part:

> Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, *but mitigation evidence must be relevant to the issue of punishment,* including, but not limited to, the nature and circumstances of the crime, and the defendant's character, background, history, and mental and physical condition as set forth in § 5-4-605. [Emphasis added.]

> Thus, to be admissible, evidence of mitigating circumstances must be relevant to the issue of the defendant's punishment. *McGehee v. State,* 338 Ark. 152, 992 S.W.2d 110 (1999).

> The disposition of Harrison's charges, which Simpson sought to offer to the jury as a mitigating circumstance, had nothing to do with Simpson's character, record, background, history, condition, or the circumstances of his crime. This information was not relevant to the issue of Simpson's punishment, and the trial court therefore did not err in refusing to submit the proffered forms to the jury.

Simpson, 339 Ark. at 473-74, 6 S.W.3d at 109.

The supreme court's first reason for finding no error – that the proffered instruction was misleading and confusing – is independent of the federal question and adequate to support the judgment; therefore, the

question cannot be reviewed by this Court. *Coleman,* 501 U.S. at 729, 111 S. Ct. at 2553. As a matter of Arkansas law, a trial court need not give an instruction that is misleading or confusing. *Jones v. Parrish,* 330 Ark. 521, 527-28, 954 S.W.3d 934, 937 (1997). This Court has no authority to review the application of this rule of Arkansas law to Simpson's case.

Morever [sic], Simpson has failed to prove that the second reason was contrary to or an unreasonable application of federal law. The clearly established federal law is that the sentencer must "not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978) (emphasis in the original). The opinion of the Arkansas Supreme Court, like the Arkansas statute, tracks the language of *Lockett.* The opinion is not contrary to *Lockett.* Nor is it an unreasonable application of *Lockett.* The jury found that Simpson was guilty of capital murder of both Pennington and Garner; that with premeditated and deliberate purpose he caused their deaths; and that he caused their deaths under circumstances manifesting extreme indifference to the value of human life. R. at 1655. These verdicts indicate that the jury believed Harrison's account, not Simpson's. According to Harrison, Simpson went into the store alone and, without telling Harrison what he was going to do, shot Pennington and Garner. Harrison's participation in the murders was not comparable to

Simpson's. On these facts, it was not an unreasonable application of *Lockett* to this case for the Arkansas Supreme Court to say that Harrison's sentence was irrelevant because Harrison's sentence did not relate to Simpson's character or record or to the circumstances of Simpson's crime. Whether a codefendant's sentence would be relevant under *Lockett* if his participation in the crime were comparable that to the defendant is an issue that need not be decided here.

Furthermore, Harrison testified during his direct examination and cross-examination that he had entered a plea of guilty and had been sentenced to 40 years in prison. R. at 1254, 1271. The record shows that the jury discussed Harrison's plea bargain. *Id.* at 1907; Post-Conviction Tr. at 90. The trial court instructed the jury:

> Form 2 lists some factors that you may consider as mitigating circumstances. However, you are not limited to this list. You may, in your discretion, find other mitigating circumstances.

R. at 1701. The jury heard the evidence that Simpson wanted them to hear regarding Harrison's sentence and discussed that evidence during deliberations either at the guilt phase or the sentencing phase. *Cf. Eddings,* 405 U.S. at 110, 102 S. Ct. at 874. The jury was not precluded from considering any aspect of Simpson's character or record or any circumstances of the offense that Simpson proffered. The record does not show that Simpson was prejudiced by the trial

court's refusal to instruct the jury to consider Harrison's sentence as a mitigating circumstance.

Simpson's fourth claim is dismissed.

E. Claim #5: Simpson claims his Eighth Amendment rights were violated by the trial court's failure and his attorney's failure to submit as mitigating circumstances that he was impaired as the result of drug abuse or intoxication and he may have had lesser involvement due to the participation of Harrison.

Simpson claims that two mitigating circumstances should have been submitted and such failure amounts to constitutional error. First, Simpson claims that the jury should have been instructed pursuant to Ark. Code Ann. § 5-4-605(3) that it could find as a mitigating circumstance that the capital murder was committed while the capacity of Simpson to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of intoxication or drug abuse. Second, Simpson claims that the jury should have been instructed pursuant to Ark. Code Ann. § 5-4-605(5) that it could find as a mitigating circumstance that the capital murder was committed by another person, that he was an accomplice, and that his participation was relatively minor.

(1) The capital murder was committed while the capacity of Simpson to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of intoxication or drug abuse.

Several persons, including Simpson's crack dealer, Bernard Gregory, testified regarding Simpson's purchases and use of crack cocaine on the night of the murders. *See, e.g.,* R. at 1161-70. Simpson also testified to his drug use on the night of the murders during his direct examination and on cross-examination. *Id.* at 1504-75. On cross-examination he testified regarding the multiple times he smoked crack that night, starting at approximately midnight and continuing through the night. *Id.* at 1527, 1530. Harrison testified they smoked crack possibly around 4:30 a.m. on the way to the store, which could have been within minutes of the murders. *Id.* at 1234-35. The record shows without dispute that Simpson and Harrison smoked crack multiple times on the night of the murders. *See id.* at 1224-76; 1504-75. In fact, they may have smoked it within fifteen minutes of committing the murders. *Id.* at 1234-35, 1507-08.

The record reflects that Simpson's lawyer submitted verdict forms at the punishment phase that included in the list of mitigating factors that Simpson was impaired as a result of intoxication or drug use, but that language was stricken and initialed by defense counsel. *Id.* at 1891-1900. There is no mention in

the record that defense counsel requested the impairment instruction in any colloquy with the court. It appears that defense counsel initially intended to request the impairment instruction but made the tactical decision at trial not to request it.

This Court cannot say that the decision not to request an impairment instruction was "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690, 104 S. Ct. at 2066. The prosecutor argued at the sentencing phase, "[i]t was all about money for crack cocaine." R. at 1706. And, "[h]e was in there to get money to feed his crack cocaine habit and he killed two people so he wouldn't get caught." *Id.* at 1708. "[H]e reduced the lives of two innocent women to the value of a $20.00 rock of crack cocaine and then ended their lives without mercy." *Id.* at 1711. Likewise, in rebuttal the prosecutor stated, "here's a man [who] had to go out and pawn a gun . . . to buy cocaine on the night of the killings." *Id.* at 1726. It is obvious that the prosecutor thought that emphasizing Simpson's use of crack cocaine would increase the likelihood that the jury would impose the death penalty. It would not have been outside the wide range of professionally competent assistance for Simpson's lawyers to have reached the same conclusion; nor does the record show a reasonable probability that, had the jury been instructed as Simpson now contends, it would have imposed a lesser sentence.

Although Simpson seems to say that the circuit court should have *sua sponte* instructed the jury that it could find as a mitigating circumstance that

Simpson was impaired by drug use, he cites no authority for that assertion, and this Court is aware of none.

Furthermore, the claim is procedurally barred from review and Simpson has not excused his default. "In most habeas corpus cases, the ubiquitous specter of procedural default overshadows our consideration of alleged constitutional violations. This case is no different." *Krimmel,* 56 F.3d at 875. Simpson failed to raise the claim until he filed the current habeas petition. On his direct appeal to the Arkansas Supreme Court, Simpson raised five issues, none of which included the lack of an impairment instruction. *See Simpson,* 339 Ark. at 470-73, 6 S.W.3d at 107-09. Simpson then presented two issues to the Arkansas Supreme Court for post-conviction relief. Neither of those claims included the lack of an impairment instruction. *See Simpson,* 355 Ark. at 298, 138 S.W.3d at 673.

The Eighth Circuit has "held repeatedly that a claim has not been fairly presented to the state courts unless the same factual grounds and legal theories asserted in the prisoner's federal habeas petition have been properly raised in the prisoner's state court proceedings." *Krimmel,* 56 F.3d at 876. *See also Jones v. Jerrison,* 20 F.3d 849, 854 (8th Cir. 1994) (in order to "fairly present" a claim to the highest state court, the petitioner must present the same facts and legal theories to the state court that he later presents to the federal courts); *Pollard v. Armontrout,* 16 F.3d 295, 297 (8th Cir. 1994) (to preserve a claim for

federal *habeas* review, a state prisoner must "present the same legal theories and factual bases to the state courts").

"[U]nless [Simpson] can show adequate cause for his failure to raise the [issue] in the state courts and actual prejudice from the alleged constitutional violations, or if he can demonstrate that failure to review a claim would result in a fundamental miscarriage of justice," the Court must dismiss his claim. *Krimmel,* 56 F.3d at 876. The jury was aware of Simpson's drug use on the night of the murders. As stated above, the record is full of testimony that Simpson smoked crack cocaine that night; and the prosecutor reminded the jury of that testimony while arguing for the death penalty. The jury was instructed that it could consider mitigating factors other than those specifically listed. R. at 1701. Had the jury thought that Simpson's use of crack cocaine mitigated his culpability, it was free so to find. The record does not show actual prejudice or a fundamental miscarriage of justice from the failure to instruct the jury that it could consider as a mitigating factor that Simpson may have been impaired at the time of the murders.

Simpson's claim regarding the impairment instruction is dismissed.

(2) The capital murder was committed by another person and the defendant was an accomplice and his participation was relatively minor.

Simpson also claims that the jury should have been instructed that it could consider as a mitigating circumstance that his participation was relatively minor. Simpson did not request such an instruction at trial. He cites no authority for the proposition that the circuit court had an obligation to give the instruction *sua sponte*. He did not raise this issue until he filed his habeas petition here. This issue is procedurally defaulted, and the default has not been excused.

Moreover, Simpson's argument is without merit. He was convicted of capital murder. The jury obviously found that he, not Harrison, shot Wendy Pennington and Lena Garner. He could not have been entitled to an instruction that the jury could consider that his involvement was relatively minor.

Simpson's claim that the jury should have been given an instruction regarding his minor participation is dismissed.

F. Claim #6: Simpson claims his Eighth Amendment rights were violated by the jury finding that no mitigating circumstances were presented, when in fact they were presented.

Simpson claims his constitutional rights were violated because the jury found that no mitigating circumstances were presented when they were in fact presented. He cites no authority for the proposition that the jury's finding renders its decision to impose the death penalty unconstitutional. Furthermore, this issue was not presented to the state courts and has been procedurally defaulted.

Simpson's claim that his constitutional rights were violated when the jury found no evidence of any mitigating circumstance is dismissed.

G. Claim #7: Simpson claims that his Sixth, Eighth and Fourteenth Amendment rights were violated by the stationing of numerous uniformed law enforcement officers around him during the penalty phase arguments.

Simpson next claims it was prejudicial for the uniformed law enforcement officers to be present in the courtroom during his sentencing. The Supreme Court has addressed this issue:

> The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a

courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial. We do not believe that it is.

The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.

Holbrook v. Flynn, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 1345-46, 89 L. Ed. 2d 525 (1986).

Simpson's claim has been procedurally defaulted. Simpson failed to present this claim to the state court and cannot present it to this Court for the first time for review. Simpson has not met the cause and prejudice and excuse standard to allow the Court to review the claim. Moreover, even if the issue were not procedurally defaulted, the record does not reveal any prejudice or that the trial court's decision was in any conflict with federal precedent.

Simpson's seventh claim is dismissed.

H. Claim #8: Simpson claims that his Eighth and Fourteenth Amendment rights were violated by the trial court permitting the introduction of irrelevant victim impact testimony.

Simpson's final argument is that the trial court erroneously permitted the introduction of irrelevant victim impact testimony. Simpson claims that the trial court erroneously permitted inappropriate and irrelevant testimony from Katrina Miller, Pennington's step-sister. The following is a transcript of the testimony in question:

Miller: I'm a teacher in the public school system; I teach fourth-graders, social studies and science. When I interact with those thirty-two

kids and see their lives and their homes, I wonder what are they going to do some day, and I try to help them see. I shared all of this with them when we talked about our section on drugs and alcohol and what they do to you and what kind of lives people lead with that. I can only hope that I imparted some good and that they see what outcomes happen because there are people out there who just don't value life. They don't value themselves. They just don't care about people.

My mother talked about my daughter. She was four when it happened and she['s] five now. I've spent hours and hours at bedtime with her. She's afraid she's going to lose me, like her cousin lost her mother. I can't tell her it's not going to happen. I took a gun from a kindergartner that was in her class this past month.

Simpson's Attorney: Your honor, may I approach?

(WHEREUPON, THE OBJECTION WAS MADE AT THE BENCH)

Simpson's Attorney: This is not jury impact testimony.

Prosecutor: Judge, it is. She's talking about how she tries to – I think what she said was she's trying to explain to this little girl about the fear that she has about her mother being taken from her. That's a very real fear for this child, because the aunt was taken and she's had violence in her own school. I can get her off of this if you want me to, but I just don't think that's objectionable. It's part of the impact on her life. She's viewing the world differently now.

The Court: Overruled.

Prosecutor: (Continuing) You were talking about your daughter, trying to make her feel safe again?

Miller: I can't. I can't tell her that she's not going to lose me. It happens all the time. We see it on T.V. We hear about it. She hears the news. She knows that I took the gun

from the kindergartner that's in her class. I can't promise her that. It's real to her. She's five and it's real to her.

She's lost her aunt and she thinks about her cousin, how she's never going to have her mother again, and it scares her. It scares me. I try to tell her life is not fair and things happen and we've got to go on and we've got to trust God to take care of us, because we can't lead bitter lives. We've got to go on. She has her whole life in front of her and I told her if she loses me, she'll still have family that loves her and will carry and will bring her through her life and that God will take care of her. But, it only becomes real to you when it happens to you. It changes your whole outlook on life.

I won't take these people out here for granted. I love them. I'll hug them, tell them that I love them every day, because you just have no promises in your life, what's going to happen. I'm

> sure if Wendy knew what was going to happen to her that day, she wouldn't have gone in, but we don't have that before us. We don't know what's going to happen to us. I'll never be the same person again.

R. at 1680-82.

Simpson's claim is unconvincing. First, the claim is procedurally barred from review because Simpson did not present the issue in his state-court petition. Second, Simpson's claim is without merit. Simpson cites no authority for the proposition that the United States Constitution requires the exclusion of this testimony.

Simpson's eighth claim is dismissed.

CONCLUSION

Sedrice Maurice Simpson's petition for writ of habeas corpus is hereby DENIED in its entirety.

IT IS SO ORDERED this 30th day of May, 2006.

/s/ J. Leon Holmes
J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

CAPITAL CASE

SEDRICE MAURICE SIMPSON PETITIONER

v. No. 5:04-CV-00429 JLH

LARRY NORRIS, Director,
Arkansas Department of Correction RESPONDENT

ORDER

Sedrice Maurice Simpson has filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). He asserts that the Court made four errors that should be corrected before the case proceeds to the appellate level.

I. *ATKINS V. VIRGINIA* CLAIM.

Simpson first argues that the Court did not address the federal precedents that demonstrate that *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), is retroactive to matters on collateral review, citing *Hill v. Anderson,* 300 F.3d 679 (6th Cir. 2002), and *Bell v. Cockrell,* 310 F.3d 330 (5th Cir. 2002). Simpson notes that at the time his case was in state court, *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), which specifically permitted execution of the retarded, was the law.

To the contrary, at page 15, the Court's Opinion and Order states, "Simpson's claim arguably relies on a new rule of constitutional law that has been made retroactive to cases on collateral review." The Court cited *Hill v. Anderson* in support of that proposition.

However, at the time Simpson was tried, Arkansas had already adopted a statutory scheme to prevent execution of the mentally retarded. *See* ARK. CODE ANN. § 5-4-618. It appears that the Arkansas statutory scheme complies with *Atkins. Atkins,* 536 U.S. at 314, 122 S. Ct. at 2248; *Anderson v. State.* 357 Ark. 180, 216, 163 S.W.3d 333, 354-55 (2004). In any event, Simpson does not challenge the constitutionality of the Arkansas statutory scheme. The fact of the matter is that Simpson did not take advantage of the statute. He never argued in state court that he was mentally retarded. Had he done so before his trial, the Circuit Court of Dallas County, Arkansas, would have conducted an evidentiary hearing, and if the circuit court found that Simpson was not mentally retarded, that finding could have been reviewed by the Arkansas Supreme Court. Nothing that the State of Arkansas did or did not do in Simpson's case is unconstitutional. The State of Arkansas provided to Simpson the protection that *Atkins* requires, but he or his lawyers made the decision not to invoke that protection. Even assuming *Atkins* is a new rule of constitutional law and is retroactive to matters on collateral review, that does not help Simpson. The rule adopted in *Atkins* as a principle of constitutional law had already been adopted in Arkansas by statute.

The rule of *Atkins* was not "previously unavailable" to Simpson. *See* 28 U.S.C. § 2254(e)(2)(A)(i).

Moreover, 28 U.S.C. § 2254(e)(2)(B) provides that the Court may not hold an evidentiary hearing on a claim arising from a new rule of constitutional law unless the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error no reasonable factfnder would have imposed the death penalty. That statute requires the Court to review the record before holding an evidentiary hearing to see if there is reason to believe that the facts underlying Simpson's claim of mental retardation would be sufficient to establish by clear and convincing evidence that he is mentally retarded and therefore cannot be executed without violating *Atkins.* This Court reviewed the entire record to see whether there was reason to think that Simpson might be able to meet that burden. The Court could not find evidence in the record to show that Simpson might be able to meet that burden. The Court did not confuse competency to stand trial with mental retardation. The Court reviewed the competency report and cited it because the competency report stated that Simpson "appeared to be functioning within the average normal range of intelligence and had a good command of the language, as well as well developed social skills." Likewise, the 1990 psychological evaluation stated that Simpson's "intellectual functioning and judgment are likely to be within normal range." These reports were not cited because the Court confused

mental retardation with competency to stand trial; they were cited because in view of the record as a whole, including the comments in these two reports, this Court cannot find that there is reason to believe that Simpson can show by clear and convincing evidence that he is mentally retarded. Therefore, pursuant to 28 U.S.C. § 2254(e)(2). the Court may not hold an evidentiary hearing even if Simpson's claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.

II. *LOCKETT* AND *STRICKLAND* CLAIM REGARDING CO-DEFENDANT'S SENTENCE.

Simpson states that the Court accepts without question the Arkansas court's claim that the sentence given to the co-defendant Harrison was misstated in Simpson's case because Harrison had received twenty years consecutive on each count rather than twenty as a whole. First, this Court's original Opinion and Order held that the ruling of the Arkansas Supreme Court that the proffered jury instruction was misleading was a matter of state law that is independent of the federal question and adequate to support the judgment; therefore, the question cannot be reviewed by this Court because this Court has no authority to review the application of a rule of Arkansas law to Simpson's case. Nothing in Simpson's present motion would cause the Court to reverse that holding.

The Court also held, on the merits, that the Arkansas Supreme Court's conclusion that Harrison's sentence was not appropriate mitigation was not an unreasonable application of *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978). Nothing in Simpson's present motion would cause the Court to reverse that holding.

Simpson also faults the Court for concluding that the jury believed Harrison. In reviewing the record as a whole, including the arguments of the lawyers on both sides, the testimony of all of the witnesses, the objective evidence, the instructions to the jury, and the jury verdicts both at the guilt phase and at the sentencing phase, the Court is convinced that the jury in this case believed Harrison's rather than Simpson's account of the murders. Although the jury in *Henry v. State,* 278 Ark. 478, 647 S.W.2d 419 (1983), imposed the death penalty on an accomplice, there the defendant took the stand and asked for the death penalty. The Arkansas Supreme Court set aside the death penalty because the evidence was overwhelming that he was merely an accomplice and did not personally fire the fatal shots and because the jury may have sentenced him to die out of passion and prejudice because the main actor in the murder could not be tried. *Id.* at 488-89. In *Sumlin v. State,* 273 Ark. 185, 617 S.W.2d 372 (1981), the jury convicted an accomplice of capital murder and sentenced him to death. However, in that case the defendant's involvement in the crime spree was far more significant than

Simpson's involvement in the murders here, if his account were believed.

III. FINDING OF NO MITIGATING CIRCUMSTANCES.

Simpson argues that the Court erred by stating that he cited no authority for the proposition that the jury's finding of no mitigating circumstances rendered its decision to impose the death penalty unconstitutional. In his petition, he did cite *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479 (1977); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); and *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). None of these authorities show that the jury verdict in this case was unconstitutional because the jury found no mitigating circumstances.

In *Giles,* the Arkansas Supreme Court held "that the undisputed evidence clearly indicates that this crime was committed while the capacity of appellant to conform his conduct to the requirements of law was impaired as a result of mental disease or defect," but the jury found to the contrary. *Giles,* 261 Ark. at 421, 549 S.W.2d at 484. There is nothing comparable here. Here, the jury could well have found that Simpson was not so young at the time of the murders that his youth should be regarded as a mitigating factor; that it was false to say that Simpson had no significant criminal history; that the commission of murder was

not totally out of character for Simpson; that Simpson had had discipline problems in jail; that Simpson did not fully cooperate with the police and, in fact, lied to them by saying that Harrison committed the murders; and that Simpson was not the primary parent or source of support for his children. None of these findings would have been clearly contrary to the evidence. In *Giles,* a reasonable jury would have to find that Giles had a mental defect that impaired his ability to conform his conduct to the law, and the court could not say as a matter of law that the aggravating factors outweighed these mitigating factors. *Id.* at 424, 549 S.W.2d at 485. The record here is not comparable to *Giles.*

IV. IMPROPER VICTIM IMPACT TESTIMONY.

In this argument, and in the preceding argument, Simpson faults the Court for not dealing with his argument that these issues were preserved by virtue of Rule 4-3(h) of the Rules of the Arkansas Supreme Court. He cites no authority for the proposition that Rule 4-3(h) is sufficient to prevent a claim from being procedurally defaulted under 28 U.S.C. § 2254. Moreover, in both instances, the Court held that the claim was procedurally defaulted and that it was without merit.

CONCLUSION

Simpson's motion to alter or amend the judgment is DENIED. Document #20.

IT IS SO ORDERED this 22nd day of June, 2006.

/s/ J. Leon Holmes
J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-2823

Sedrice Maurice Simpson,

Appellant

v.

Larry Norris, Director,
Arkansas Department of Correction,

Appellee

Appeal from U.S. District Court for the
Eastern District of Arkansas – Pine Bluff
(5:04-cv-00429-JLH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Loken, Judge Colloton and Judge Gruender would grant the petition for rehearing en banc.

Judge Smith and Judge Shepherd did not participate in the consideration or decision of this matter.

COLLOTON, Circuit Judge, with whom LOKEN, Chief Judge, and GRUENDER, Circuit Judge, join, dissenting from denial of rehearing en banc.

I would grant rehearing en banc to consider whether, as the panel apparently concluded, it is

"irrelevant" to Sedrice Simpson's application for writ of habeas corpus that Arkansas – unlike Virginia, *cf. Walker v. True,* 399 F.3d 315, 326-27 (4th Cir. 2005) – *already complied* with the Eighth Amendment rule announced in *Atkins v. Virginia,* 536 U.S. 304 (2002), even before *Atkins* was decided. The Supreme Court in *Atkins* specifically cited Arkansas as one of the States that had contributed to the development of a "national consensus" that a mentally retarded offender should not be subjected to the death penalty. *Id.* at 314 & n. 12. Under its statutory procedure, *see* Ark. Code § 5-4-618, Arkansas afforded Simpson an opportunity to establish that he was categorically ineligible for the death penalty due to mental retardation, but Simpson failed to pursue that defense. Having been presented with no claim of mental retardation, Arkansas imposed a sentence of death. This led the district court to remark that "[n]othing that the State of Arkansas did or did not do in Simpson's case is unconstitutional," because "[t]he State of Arkansas provided to Simpson the protections that *Atkins* requires, but he or his lawyers made the decision not to invoke that protection." (R. Doc. 23, at 2).

Whether or not the restrictions of 28 U.S.C. § 2254(e) apply to Simpson's request for an evidentiary hearing, Simpson must show at a minimum that there are material facts to be developed on the question whether Arkansas violated his constitutional rights. *Townsend v. Swain,* 372 U.S. 293, 312-13 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992). If Arkansas imposed a

death sentence under a statutory procedure that fully complies with *Atkins*, then it is difficult to see how Simpson has a claim at this point that evidence of his alleged mental retardation could show that Arkansas violated his constitutional rights. *Atkins* did not hold that a State must permit a capital defendant to raise the defense of mental retardation at any time he wishes and in any manner that he chooses. *See Atkins*, 536 U.S. at 317 ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.") (internal quotation omitted).

There is likewise a serious question whether Simpson can show "cause" to excuse the procedural default that he committed by failing to present a claim of mental retardation to the state courts. *Cf. Williams v. Taylor*, 529 U.S. 420, 444 (2000). If Simpson had pursued successfully a defense of mental retardation under Arkansas law, then the State would have excluded him categorically from eligibility for the death penalty, and thus complied with the equivalent rule of federal law announced later in *Atkins*. *See* Ark. Code § 5-4-618(b). Where a habeas corpus applicant fails to pursue a state-law claim that is a necessary element of a then-unavailable federal claim, the Supreme Court's later announcement of the federal claim does not constitute cause that excuses the applicant's procedural default. *Dugger v. Adams*, 489 U.S. 401, 407-10 (1989). There is no apparent reason why the result should be different here, where the applicant failed to pursue an available claim

under a state statute that anticipated and embodied the subsequently announced federal rule. The district court, moreover, determined that Simpson cannot meet the standard for "actual innocence" of the death penalty, *see Sawyer v. Whitley*, 505 U.S. 333, 336 (1992), so that avenue for excusing Simpson's default also appears to be closed. (R. Doc. 23, at 2-3).

This case raises the important question whether Arkansas may enforce its procedural requirement that a claim of mental retardation must be raised in a timely way through the means specified by state law. That is quite different from the question decided in *Atkins* as to whether a State may forbid a capital defendant altogether from establishing that he is categorically ineligible for the death penalty based on mental retardation. For the foregoing reasons, I would grant the State's petition for rehearing.

August 20, 2007

Order Entered at the direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true

and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Arkansas Code Annotated § 5-4-618. Mental Retardation

(a)(1) As used in this section, "mental retardation" means:

(A) Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and

(B) A deficit in adaptive behavior.

(2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

(b) No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.

(c) The defendant has the burden of proving mental retardation at the time of committing the offense by a preponderance of the evidence.

(d)(1) A defendant on trial for capital murder shall raise the special sentencing provision of mental retardation by motion prior to trial.

(2)(A) Prior to trial, the court shall determine if the defendant has mental retardation.

(B)(i) If the court determines that the defendant does not have mental retardation, the defendant may raise the question of mental retardation to the jury

for determination de novo during the sentencing phase of the trial.

(ii) At the time the jury retires to decide mitigating and aggravating circumstances, the jury shall be given a special verdict form on mental retardation.

(iii) If the jury unanimously determines that the defendant had mental retardation at the time of the commission of capital murder, then the defendant will automatically be sentenced to life imprisonment without possibility of parole.

(C) If the court determines that the defendant has mental retardation, then:

(i) The jury is not "death qualified"; and

(ii) The jury shall sentence the defendant to life imprisonment without possibility of parole upon conviction.

(e) However, this section is not deemed to:

(1) Require unanimity for consideration of any mitigating circumstance; or

(2) Supersede any suggested mitigating circumstance regarding mental defect or disease currently found in § 5-4-605.